No. 835

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Supreme Court, U. S.
FILED
MAY 31 1955
HAROLD B. WILLEY, Clerk

APPENDIX A.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

September Term, 1954.

Friday, January 21, 1955.

No. 15,117.

LILLIAN M. JONES,
Appellant,
vs.
AVCO MANUFACTURING CORPORATION,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,118.

AVCO MANUFACTURING CORPORATION,
Appellant,
vs.
ELDON T. JONES,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, affirmed.

January 21, 1955.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing typewritten page contains a full, true and complete copy of the Judgment of the United States Court of Appeals for the Eighth Circuit entered on January 21, 1955, in the cases of Lillian M. Jones, Appellant, vs. Avco Manufacturing Corporation, No. 15,117, and Avco Manufacturing Corporation, Appellant, vs. Eldon T. Jones, No. 15,118, as full, true and complete as the original thereof remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 12th day of May, A. D. 1955.

/s/ E. E. Koch,

(Seal)

Clerk of the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,117.

LILLIAN M. JONES,
Appellant,

vs.

AVCO MANUFACTURING CORPORATION,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

No. 15,118.

AVCO MANUFACTURING CORPORATION,
Appellant,

vs.

ELDON T. JONES,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Before GARDNER, Chief Judge, and COLLET and VAN OOSTERHOUT, Circuit Judges.

COLLETT, Circuit Judge.

Plaintiff obtained a jury verdict for $25,000 damages for personal injuries. Judgment notwithstanding the verdict was entered by the court for the defendant, from which

plaintiff appeals. There was a precautionary appeal by defendant.

Eldon T. Jones was a territorial service agent for Avco Manufacturing Corporation, the manufacturer of Bendix products. His territory encompassed several states, including Missouri and Oklahoma. He and his wife, Lillian M. Jones, lived at Kansas City, Missouri. In 1950 he became affected with acute arthritis and was unable to travel alone by automobile. In order to enable him to continue his work, he sought and obtained the approval of his employers of the practice of his wife, Lillian, accompanying him on automobile trips on the company's business. The company did not pay for her services or her expenses. From Mrs. Jones' association with her husband's work in that manner, she became familiar with some of the problems he encountered. One of those problems was to reconcile or assist in reconciling differences between distributors of Avco products and retailers of those products. Occasionally a distributor employed a separate service agency on a contract basis to service the appliances it sold, and controversies arose between the service agency and retailers. These latter controversies arose from protests from retailers that the service agency was not performing its contractual duty of giving proper service to customers of the retailer, and the service agency complaining that the retailer was "overselling" the appliances, *i. e.*, was representing to the customer that the appliance would do things it should not have been represented as capable of doing, with the result that customers were calling for service which was not within the contemplation of the service contract. Mrs. Jones, being with her husband during the time he was affected with arthritis, would frequently be of assistance to him in working out these differences by "shopping" the retailers, *i. e.*, acting as a prospective customer, learning what representations were

being made and reporting to her husband. That information was useful and valuable to him when he called the retailer, the service agency, and the distributor together to work out their differences. In assisting her husband, Mrs. Jones, of course, was of assistance to her husband's employer in whose service her husband was engaged. Avco knew of Mrs. Jones' activities in this regard and commended Jones for the practice.

Mr. Jones' arthritic condition improved to such an extent that it was no longer necessary for someone to accompany him. Thereafter a controversy of the above-described nature developed at Oklahoma City, Oklahoma, involving the Oklahoma distributor of Avco's products, the Leo Maxwell Company, the latter's contract service agent, and retailers who purchased Avco's products from the distributor, Leo Maxwell Company. Mr. Rosenberry was service manager for the Leo Maxwell Company. On April 21, 1951, Mr. Rosenberry called Mr. Jones at Kansas City, Missouri, and asked the latter to come to Oklahoma City to assist in working it out. Learning of the assistance Mrs. Jones had been in other similar situations in the past, Mr. Rosenberry asked that Mr. Jones bring Mrs. Jones with him. Jones had intended to make a trip that week to Amarillo, Texas. Mrs. Jones was not to accompany him to Amarillo. He changed his itinerary and arranged to go to Oklahoma City instead and, pursuant to Mr. Rosenberry's request, took Mrs. Jones with him. En route to Oklahoma City, a short distance north of Colony, in the State of Kansas, while Mr. Jones was driving and Mrs. Jones was asleep, the Jones car collided with a car driven by Mr. John F. Kinney. Mrs. Jones was seriously injured. Under the law of Kansas, one spouse may not recover from the other in tort for personal injuries. Mrs. Jones sued Kinney, alleging negligence on his part. Later, by amendment, she brought in Avco as a defendant

upon the theory that Jones was acting as its agent and that Avco was liable for its agent's negligent conduct resulting in injury to her. Under the Kansas guest statute,[1] Mrs. Jones could not as a guest recover in the absence of gross or wanton negligence. She did not allege gross or wanton negligence. She contended she was a "paying passenger" within the meaning of the guest statute on the ground that Jones had authority to take her on the company's business and did so. If that was correct, she would not have been a guest under the Kansas statute and could recover for the negligence alleged and proved. Avco denied that Mr. Jones was authorized to take Mrs. Jones on this trip or that Mrs. Jones was making the trip for Avco. Kinney denied negligence. Avco brought Jones into the case as a third party defendant for the purpose of obtaining a judgment against him for any amount which Mrs. Jones might recover from Avco. Avco also contended that Mrs. Jones could not under the law recover from her husband's employer for injuries inflicted upon her by her husband's negligence. The jury concluded that Jones was negligently responsible for the accident. Under instructions not then or now assailed, it found for Mrs. Jones in the amount of $25,000 against Avco, and found in favor of Avco against Jones for the same amount. Absolving Kinney from responsibility, it found for him against Mrs. Jones. Judgment was entered for Kinney on the verdict. There was no appeal from that part of the judgment. Kinney is out of the case. The trial court sustained Avco's motion for judgment notwithstanding the

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[1]"That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle." Section 8-122b, General Statutes of Kansas (1949).

verdict upon the theory that there was no evidence to support the verdict for Mrs. Jones against Avco. The court also set aside the verdict in favor of Avco against Jones. Avco's "precautionary" appeal, as we referred to it, was from the action of the court in setting aside its verdict against Jones in the event Mrs. Jones' verdict against it should be reinstated on appeal.

We have given a great deal of consideration to the question of whether Mrs. Jones was a compensating passenger or merely a guest under the Kansas guest statute. The Kansas Supreme Court has not determined that question under facts similar to these. *Albrecht* v. *Safeway Stores,* 80 P. 2d 63 (Oregon), cited with approval by the Kansas Supreme Court (See *Sparks* v. *Getz,* 170 Kan. 287, 225 P. 2d 106, and *LeClair* v. *Hubert,* 152 Kan. 706, 107 P. 2d 703), gives substantial support to the position that to be a compensating guest under a guest statute like that of Kansas one need not show express authority in the agent of an employer to take the passenger on the mission, or that the passenger is in a formal sense an agent or employee of the driver's employer. But we are not in agreement on the question of what legal status the Kansas courts would give Mrs. Jones on the facts before us. And we have concluded that the answer to another question is decisive of this appeal. Hence we do not undertake to pass upon the question of whether Mrs. Jones should be held to be a compensating passenger or a guest only, under the Kansas guest statute.

Regardless of whether Mrs. Jones was a guest or not, and entirely independent of that question, it is necessary to a recovery by Mrs. Jones against Avco, Mr. Jones' employer, that the record disclose a justifiable basis for making Avco responsible to Mrs. Jones for the injury she received as a result of Mr. Jones' negligence. To support such responsibility and liability on the part of Avco, the general

rules of agency must be applied rather than the more limited rules applied in determining status as guest or compensating passenger under varying state guest statutes. There was no express or implied authority given Jones by Avco to transport anyone with him on this trip. Avco was without knowledge that Jones was to take anyone with him. It does not appear that it was necessary in the discharge of Jones' duties that he transport someone from Kansas City to Oklahoma City for the purpose Mrs. Jones accompanied him. It would be a dangerous doctrine to say that an employer is liable for injury caused by the negligence of an employee to anyone who the agent, for reasons of his own, chose to take with him as a passenger without the knowledge of the employer and without the latter's express or implied authority. We are convinced that such a legal doctrine would transgress the generally established rules of agency. *Gosney* v. *Metropolitan Life Ins. Co,* 114 F. 2d 649; *United States* v. *Eleazer,* 177 F. 2d 914; *Liggett and Myers Tobacco Co.* v. *Deparcq,* 66 F. 2d 678; *Pesot* v. *Yanda,* 126 S. W. 2d 240; *Klotsch* v. *Collier,* 159 S. W. 2d 589; *Oganaso* v. *Mellow,* 201 S. W. 2d 365.

Since the judgment of the trial court was correct for the reasons stated, it is unnecessary to consider the defense of Avco that Mrs. Jones could not, under the law of Kansas, sue her husband's employer in tort.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

FILED
JUL 9 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 115.

LILLIAN M. JONES, PETITIONER,

VS.

AVCO MANUFACTURING CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT AVCO MANUFACTURING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI OF PETITIONER LILLIAN M. JONES.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 115.

LILLIAN M. JONES, PETITIONER,

VS.

AVCO MANUFACTURING CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT AVCO MANUFACTURING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI OF PETITIONER LILLIAN M. JONES.

I.

JURISDICTION.

Petitioner as appears under her Statement As To Jurisdiction (Petition, p. 6) seeks to invoke the jurisdiction of this Court to review the judgment of the United States

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The record references (R. and S. R.) used in this brief are to the printed Record filed by petitioner in the United States Court of Appeals for the Eighth Circuit and to the printed Supplemental Record filed by the respondent in that Court, and both of which we are advised have been certified to this Court by the Clerk of the United States Court of Appeals for the Eighth Circuit.

Court of Appeals for the Eighth Circuit (Petition, Appendix A, p. 10) upon the sole ground that such judgment violates Fed. Rules Civ. Proc., Rule 50, 28 U. S. C. A., and therefore denies to petitioner a right to a jury trial under Fed. Rules Civ. Proc., Rule 38, and the Seventh Amendment to the Constitution of the United States. Such ground is non-existent. Rule 50 has been, in all respects, complied with by both the District Court in which the cause was tried and by the United States Court of Appeals on review of the District Court's judgment on appeal.

In compliance with Rule 50(a) the respondent in the trial court filed a motion for directed verdict in its favor at the close of petitioner's evidence (R. 107-109. Following the close of plaintiff's evidence in the trial court, evidence was introduced on behalf of the then co-defendant in the cause, John F. Kinney. Respondent offered no evidence but rested following both the petitioner and the co-defendant Kinney having rested (R. 111). Thereupon respondent filed its motion for a directed verdict in its favor at the close of all the evidence (R. 111-113). Both of said motions were overruled (R. 109, R. 115). Thereafter and pursuant to Rule 50 (b) the District Court submitted plaintiff's action to the jury as to this respondent, subject to a later determination of the legal questions raised by respondent's motions for a directed verdict. The jury returned its verdict (R. 131) and within ten days after the reception of that verdict, and in further compliance with Rule 50(b), the respondent filed its motion entitled Motion For Judgment Non Obstante Veredicto wherein it moved that the verdict against it and in favor of the plaintiff Lillian M. Jones and any judgment entered thereon be set aside, and that judgment be entered for respondent in accordance with respondent's motions for a directed verdict, and in the same motion, and

as likewise provided for under Rule 50 (b), respondent moved in the alternative for a new trial (R. 132-135). The Trial Court as is evidenced by its opinion (R. 137) gave careful consideration to the legal questions previously reserved, including the question of the sufficiency of the petitioner's evidence to make a submissible case for the jury against respondent, and having done so held that respondent's motion for directed verdict filed at the close of the whole case should have been sustained and that as a consequence its motion notwithstanding the verdict must be sustained and so ordered (R. 139). Whereupon the trial court entered judgment sustaining said motion n. o. v. and adjudging that the verdict of the jury in favor of the petitioner against the respondent and the judgment of the Court entered thereon be set aside and held for naught, and further adjudged that judgment for respondent and against plaintiff was thereby entered notwithstanding the verdict of the jury (S. R. 46-48).* The petitioner appealed to the United States Court of Appeals, Eighth Circuit, "the order of the Court granting defendant Avco's motion for judgment notwithstanding the verdict and from the judgment against plaintiff in said cause." (R. 141). Upon petitioner's appeal, the Court of Appeals, Eighth Circuit, has reviewed this judgment of the trial court (S. R. 46-48) and by its judgment has affirmed that judgment (Petition, Appendix A, p. 10). Thus, as appears from the record in this cause, every step and element of Rule 50 has been fully complied with and no step or element thereof in the

*The purported judgment of the District Court printed at R. 140, 141, of the printed record on appeal filed by petitioner in the United States Court of Appeals for the Eighth Circuit is not any judgment that was rendered in this case, the correct judgment of the District Court appears in the printed Supplemental Record on Appeal filed by this respondent in the United States Court of Appeals at pages 46 to 48, inclusive.

entire proceedings had in both the trial court and in the United States Court of Appeals, Eighth Circuit, has been overlooked by either court, but each and every step and element of Rule 50 has received the compliance and careful consideration of both courts. The question as to whether Jones was authorized to transport the petitioner in his personally-owned automobile on the particular trip involved was not an issue of fact, but was a pure question of law to be determined by the court, and not by the jury. Whether the evidence, if any, was sufficient or otherwise, to sustain a legal conclusion contrary to that declared by the trial court and the Court of Appeals, was in the first instance a question of law to be resolved by the trial court. As required by Rule 50, the trial court reserved its ruling on these law questions and took the verdict of the jury for the petitioner pending its rulings on the respondent's motions for a directed verdict and subject to those rulings. *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 659, 55 S. Ct. 890, 892. None of the cases cited by the petitioner (*Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Conway* v. *O'Brien*, 312 U. S. 492, 61 S. Ct. 634; Petition, p. 8) stand for or in any degree support the proposition that where full compliance has been made with Rule 50(a), (b), both by the trial court and the Court of Appeals as the record shows was done in this case, there has been any denial to the petitioner of her right to a jury trial.

In *Lavender* v. *Kurn*, *supra*, a Federal question was involved. The Court granted certiorari to review the propriety of the Supreme Court of Missouri in reversing a judgment on the ground there was no substantial evidence to support a submission of the case to the jury, in a suit arising under the Federal Employers' Liability Act.

The issues involved and upon which the case turned were issues of fact only, triable by a jury and not by a court.

In *Tennant* v. *Peoria & P. U. R. Co., supra,* this Court granted certiorari in another Federal Employers' Liability case to review a judgment of the United States Court of Appeals, Seventh Circuit, reversing a judgment of the District Court on the ground there was no substantial proof that the negligence found to exist was the proximate cause of the death of the petitioner's decedent. Again only issues of fact triable by a jury were involved.

In *Conway* v. *O'Brien, supra,* the District Court had denied the respondent's motion for a directed verdict at the close of the case. After verdict the respondent did not file a motion for judgment n. o. v. The United States Court of Appeals for the Second Circuit reversed the judgment of the District Court on the ground the evidence of gross negligence was insufficient to go to the jury and dismissed the complaint. This Court granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) to authorize a dismissal of the complaint. This Court did not however reach this question, which gave rise to the jurisdictional ground upon which it took the case, because in its view of the merits it held that under Vermont law the issue of gross negligence was a fact issue to be submitted to and tried by a jury. In the case at bar and as above pointed out, there has been no lack of compliance with Rule 50(a) or (b), and the only question involved is the question of law.

The record in this case rather than presenting a ground for invoking the jurisdiction of this Court as alleged by petitioner clearly discloses a complete absence of jurisdiction.

II.

STATEMENT.

The husband of petitioner, Eldon T. Jones, was, in April of 1951, employed by the Bendix Home Appliances Division of defendant Avco Manufacturing Corporation as a field service supervisor. His residence was in Kansas City, Missouri. Jones' superior was Alvin P. Smith, the company's then National Service Manager, in its general offices in South Bend, Indiana (R. 30-31). The testimony of Alvin P. Smith was introduced by petitioner as a part of her case. At the time Smith's testimony was given he was not in the employ of respondent (R. 83).

Mr. Jones in his work for respondent was free at all times to select any mode of transportation he desired in covering his territory. He could use the train or plane or he could use his own personal automobile. That was never dictated to him at any time by respondent (S. R. 10-11). If he chose to use his personal automobile, respondent did not direct him or exercise any control over him in the driving and operation of it (S. R. 10). Jones was paid a monthly salary plus his normal expenses in working his territory and for travel (R. 31-32).

Prior to his employment by respondent, Jones in June of 1947 went to work for Bendix Home Appliances, Inc. (R. 49, S. R. 3, 4). The business of that company was taken over by, and it became a division of respondent in December of 1950 (S. R. 30). Within a few weeks after commencing to travel his territory in 1947 for the old Bendix company, Jones was stricken with arthritis (R. 37). At that time, Jones territory covered eleven states which he traveled mostly by train and later in some cases by plane. It was not until the latter part of 1950 that he began to use his personally-owned automobile to cover any

part of his territory (S. R. 9). On the trips that the petitioner accompanied him on, Mr. Jones paid all of her railroad and plane fares and all of her hotel expenses and all other incidental expenses that she had. He was never paid or reimbursed by either Bendix Home Appliances, Inc., or by respondent for any of the expenses incurred by, or for, petitioner (S. R. 9).

In the week prior to the week commencing Monday, April 23, 1951, Jones had made a forecast that he would be calling on a distributor in Amarillo, Texas, the week of April 23 (R. 33). He planned to fly to Amarillo and back (R. 42). He did not intend to take Mrs. Jones with him to Amarillo (R. 61) and Mrs. Jones had not planned to go (R. 39). On Saturday, April 21, 1951, Jones received a call from one John Rosenberry, the service manager for the Leo Maxwell Company at Oklahoma City, a distributor of respondents. Rosenberry told Jones that trouble between the Maxwell Company sales department, the dealers and the independent service organizations, was coming to a head and asked if Jones could come down the following week and Jones told him he could make a change in his planning and be there on Monday morning (R. 33, 61). Rosenberry also asked if petitioner could come along with Jones and do some shopping of the Maxwell Company's dealers (R. 29, 33, 34). Rosenberry was not employed by respondent (R. 29). According to Jones it was his duty to go when a distributor called and it was his job to be in Oklahoma City and call on the Maxwell Company on Monday morning, whether Mrs. Jones could go with him or not (R. 61, S. R. 16).

Jones changed his forecast to be in Amarillo on his itinerary sent in to respondent on April 21, 1951, stating he would be in Oklahoma City on Monday, April 23 (R. 33). He requested petitioner to go with him (R. 39). Un-

til this request was made, petitioner had not planned to go to Oklahoma City for any reason and had no other reason for going (R. 95). In requesting petitioner to go, Jones said Rosenberry had wanted her to do some shopping in Oklahoma City (R. 101). Mr. Jones and the petitioner, with Jones driving the car, left Kansas City on Sunday afternoon, April 22, 1951, and got only to a point between Garnett and Colony, Kansas, when the accident occurred (R. 40). Jones selected his own personal automobile as the means of traveling on this particular trip because of the heavy burden of traveling expense he would otherwise have if he took the plane as he would have to pay the petitioner's plane fare and expenses (R. 52). The petitioner did not plan Mr. Jones' itinerary nor did she drive on this trip. She could not drive an automobile (R. 46).

During the course of the trial and in response to questions put by the trial court, it was judicially admitted by counsel for plaintiff as follows:

1. Jones was not authorized to employ plaintiff to perform services for respondent (R. 36).

2. Petitioner was never an agent of respondent (R. 35).

3. Petitioner was not an employee of respondent (R. 43).

4. Petitioner was not on a joint enterprise mission with Mr. Jones (R. 35, 43).

In answer to a direct question that he had no authority to employ or hire a shopper, Jones testified he did not employ or hire one (S. R. 16). He further testified that in the period of April of 1951 and prior thereto, he had no authority to employ clerks and stenographers and that he did not employ any or employ anyone to help him (S. R. 20).

It was the testimony of Alvin P. Smith, the former National Service Manager for respondent, and of Wayne H. Hollett, a former employee of respondent and one of Smith's assistants in the South Bend office, both of whom petitioner made her witnesses at the trial, that respondent did not know that Mr. Jones was taking petitioner with him on business trips to assist him in the performance of his duties with respondent, and did not at any time request petitioner to render any such assistance to him (S. R. 27, 33, 34, 45). Jones testified that his use of petitioner to do shopping for him was his own personal unique idea (S. R. 18, 19) and that using her for that purpose had never been suggested to him by respondent (S. R. 18).

Smith further testified that immediately prior to April 22, 1951, Jones was in generally fair health and was able to cover his territory and do his work (S. R. 31). So far as he knew there was no need, on account of Jones' physical condition, for the petitioner to accompany him on his trips at the time of this accident (S. R. 32). Smith further testified that he did not have any knowledge that petitioner was to accompany Mr. Jones on his trip leaving Kansas City on April 22, 1951, and he did not authorize Mr. Jones to take the petitioner with him on this trip (S. R. 34).

III.

ARGUMENT.

The judgment of the Court of Appeals for the Eighth Circuit does not deny the petitioner a right to trial by jury of any fact issue petitioner is entitled to have tried by virtue of the Seventh Amendment. The sole question decided by the Court of Appeals for the Eighth Circuit is a question of law.

At the trial the respondent offered no evidence but stood on its motion for a directed verdict. Therefore, with

respect to the purported "Questions Presented" by petitioner in her petition the only evidence in the record is that which petitioner introduced.

The judicial admissions made by petitioner's counsel at the trial admit that Jones had no authority from respondent, apparent, express or implied, to take the petitioner with him in his car on this trip. By these admissions, petitioner was and is bound. *Oscanyon* v. *Arms Co.*, 103 U. S. 261, 262, 263, 264; *Wiget* v. *Becker,* (8th Cir.) 84 F. 2d 706, 710, 711; *United States Shipping Board Emergency Fleet Corporation* v. *South Atlantic Dry Docks Co.,* (5th Cir.) 19 F. 2d 486, 489; *Pratt* v. *Conway,* (Mo. Sup.) 49 S. W. 1028, 1030; *Wood* v. *Wells,* (Mo. Sup.) 270 S. W. 332, 334; *Sonken-Galamba Corporation* v. *Missouri Pac. R. Co.,* (Mo. App.) 40 S. W. 2d 525, 529; *State ex rel. St. Louis Basket & Box Co.* v. *Reynolds,* (Mo. Sup.) 224 S. W. 401, 403.

Aside from these judicial admissions the record in this cause is completely lacking in evidence to support the legal conclusion that Jones had the authority that petitioner contends for. Petitioner argues (Petition, pp. 5, 6) there is no affirmative evidence in the record that Jones did not have the authority she claims. The point is that there is no evidence to show he did. The burden of proving facts sufficient to invoke the conclusion was on petitioner. She failed to sustain that burden. In fact the petitioner's evidence referred to in the Statement in this brief proved her husband Jones did not have the authority she contends for.

Giving the petitioner the benefit of all the evidence and every reasonable inference in her favor that might be drawn therefrom, there are no facts that can be found from that evidence to justify any legal conclusions con-

trary to that declared by the judgment of the Court of Appeals for the Eighth Circuit and by judgment of the trial court as well.

The mention in the opinion of the Court of Appeals for the Eighth Circuit that respondent knew of the shopping activities of petitioner and had commended Jones for that practice refers to the only evidence in the record on that point, which relates back to the time when Jones was affected with arthritis. Jones testified that long prior to this trip on April 22, 1951, in meetings in South Bend, he made Mr. Smith and Mr. Parker Erickson, another superior of his, aware that he had on past occasions used petitioner to shop dealers in Omaha (S. R. 17, 18, 19; R. 59, 62, 63, 64). There is not one word of testimony to show that such use, if any, as Jones did make of petitioner on those past occasions was ever authorized by respondent. Neither is there any evidence that after Jones told Smith and Erickson about it that either of them, or anyone else for respondent, authorized any such use of her for the future. The whole idea of using petitioner was Jones' own personal unique idea (S. R. 18, 19) and was never suggested by respondent (S. R. 18, 19). In fact, as shown by Smith's testimony, respondent never knew of Jones taking petitioner on business trips to assist in carrying out any of his duties with respondent (S. R. 33, 34, 35). The petitioner testified she went on this trip with Jones solely because Rosenberry had asked if he could bring her along (R. 94, S. R. 37, 38) and she was not present in his car because of any prior condition of arthritis her husband had suffered from commencing back in 1947. Rosenberry was not an employee of respondent but was employed by the Leo Maxwell Company in Oklahoma City. The sole reason Jones selected driving his own car (over which respondent neither exercised nor reserved any control or right

of control) to Oklahoma City was that since Rosenberry had asked him to bring petitioner along, he would not have to pay the heavy burden of expenses for her that would be his if he took her on the plane (S. R. 12).

It is petitioner's theory that Jones was clothed by respondent with authority to take her in his automobile on his trip for the purpose of having her shop dealers during the following week in Oklahoma City. The evidence to which petitioner adverts in her petition (Petition, pp. 4, 5) is not evidence of that claimed authority. Evidence that service supervisors had taken their wives with them on business trips without first notifying respondent is not evidence that they were authorized to take them or to take them to assist in the performance of their work. It would be extremely difficult, if not impossible, for an employer to police such activities of traveling men particularly if one should have some unique reason of his own for doing so as did Jones, and decide to do it. Certainly such is not evidence that Jones had authority to take petitioner on this particular trip.

Evidence that it was Jones' obligation to call on the Maxwell Company, and that it was his duty to respond to the call of that company, it being a part of his job to go whether petitioner could go or not, is not evidence of an authority from respondent to take petitioner along for any purpose. The fact that her going may have been a part of the planning between Maxwell Company's employee Rosenberry and Jones does not support an authority from respondent to take her. Respondent was wholly without knowledge of this and did not consent to it. As pointed out in the opinion of the learned trial judge, if petitioner voluntarily assumed to act for respondent, that does not make respondent liable for her personal injuries under the facts shown in evidence, absent any acquiescence or con-

sent by respondent, and the fact that she was requested to go by Mr. Jones could not make respondent liable to her. It is admitted that Mr. Jones had no authority to have her so act, or employ her, or any other person's assistance for that purpose (R. 139).

What the Court of Appeals for the Eighth Circuit did in this case, as shown by its opinion, was to consider all of the evidence on this question and every reasonable inference that could be drawn therefrom in the light most favorable to petitioner and then hold that tested by the established common law rules of agency, there was no evidence of facts and no inferences of fact that would support the petitioner's claim against respondent. In this, as we have previously pointed out, there is no fact issue involved as to which petitioner would be entitled to a jury trial. That the judgment of the Court of Appeals for the Eighth Circuit, is correct, is supported by all of the accepted principles of agency applicable to the facts shown in evidence. *United States* v. *Eleazer,* (4th Cir.) 177 F. 2d 914; *Liggett & Myers Tobacco Co.* v. *De Parcq,* (8th Cir.) 66 F. 2d 678; *Metropolitan Life Insurance Co.* v. *Gosney,* (8th Cir.) 101 F. 2d 167; *Gosney* v. *Metropolitan Life Insurance Co.,* (8th Cir.) 114 F. 2d 649; *Oganaso* v. *Mellow,* (Mo. Sup.) 201 S. W. 2d 365; *Pesot* v. *Yanda,* (Mo. Sup.) 126 S. W. 2d 240; *Klotsch* v. *P. F. Collier & Son Corporation,* (Mo. Sup.) 159 S. W. 2d 589; *Murphy* v. *Barry,* 264 Mass. 557, 163 N. E. 159; *Mayhew* v. *DeCoursey,* 135 Kan. 184, 10 P. 2d 10; *Riggs* v. *Higgins,* (Mo. Sup.) 106 S. W. 2d 1; Restatement of the Law of Agency, Sec. 239, pp. 383, 384, 385. Petitioner has no authority to the contrary and cites this Court to none in her petition.

Thus the Court of Appeals for the Eighth Circuit, in affirming the judgment of the trial court, has decided a question of law only and neither that Court nor the trial

court has substituted their judgments on any fact issue that petitioner was entitled to have tried and determined by a jury by virtue of the right accorded by the Seventh Amendment.

In speaking of the limitations of the Seventh Amendment, this Court in the case of *In re Peterson*, 253 U. S. 300, 310, 40 S. Ct. 543, 546, has held:

> "The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.
>
> "* * * No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."

In the case of *Treat Manufacturing Company* v. *Standard Steel and Iron Company*, 157 U. S. 674, 675, this Court held:

> "But it is well settled that where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant."

This Court's ruling that the decision after verdict of the reserved questions raised on a motion for a directed verdict at the close of the evidence is in no way a usurpation of the function of the jury or a denial of a right to a jury trial under the Seventh Amendment has been consistently followed by the lower Federal Courts. *Italian Star Line, Inc.*, v. *United States Shipping Board Emergency Fleet Corporation et al.*, (2nd Cir.) 53 F. 2d 359, 360, affirming *Italian Star Line, Inc.*, v. *United States Shipping Board Emergency Fleet Corporation et al.*, (S. D. N. Y.) 41 F. 2d 382, 384, 385; *Bohenik* v. *Delaware & Hudson Co.*,

(2nd Cir.) 49 F. 2d 722, 724; *F. C. Ayres Mercantile Co.* v. *Union Pac. R. Co. et al.*, (8th Cir.) 16 F. 2d 395, 397; *Brunet* v. *S. S. Kresge Co.*, (7th Cir.) 115 F. 2d 713, 716.

IV.

CONCLUSION.

For all of the reasons and authorities hereinbefore set out, respondent respectfully prays that the petition for certiorari in this cause be denied.

Respectfully submitted,

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